

United States District Court
For The District Of New Mexico

Petition 28 U.S.C. § 2255

Orin Kristich

Petitioner

FILED

UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

JUL 29 2022

MICHELL R. ELFERS

CLERK United States Of America

Respondant

Case No.

{1:16-CR-02635-WJ}
{1:20-cv-01309}

Petition 28 U.S.C. § 2255;

(D.P.P.A.; F.S.A.; U.S. Const; F.S.A.
18 U.S.C. § 4161)

- 1 Now comes, Orin Kristich, to Petition this court for
- 2 review of his conviction and sentence pursuant to § 2255;
- 3 The Due Process Protection Act; The First Step Act; The United
- 4 States Constitution; The Fair Sentencing Act; and 18 U.S.C. § 4161; for
- 5 the following reasons:
- 6 Ineffective Assistance of Counsel: (I.A.C.)
- 7 ① The Sixth Amendment provides that "in all criminal prosecution(s),
- 8 the accused shall enjoy the right to have assistance of counsel

9 for his defense." Mr. Kristich(s) Counsel was ineffective
10 assistance of counsel in this case. Furthermore, Mr. Kristich(s)
11 conviction is invalid because of his counsel(s) failure to
12 raise all the claim(s) herein; in his defense, and such claim(s)
13 are of a Constitutional nature. (see The Strickland Teste)
14 In Hill v. Lockhart, "the Strickland test applied to the plea
15 bargaining context." In light of the above case it is very
16 unreasonable for counsel to advise Mr. Kristich to sign a
17 plea only a few months after Mr. Kristich tested positive
18 for Covid-19; in (7-24-2020.) Mr. Kristich changed his plea
19 on (10-23-2020)
20 A. Mr. Kristich(s) counsel did not investigate his mental health
21 after he tested positive for covid ; before letting him sign any
22 plea. (counsel knew that evidence on the record in 1:20-cv-01309)

23 "Evidence shows that the Covid-19 pathogen can impact "nearly
24 every major organ system in the body", and can leave even
25 young and otherwise healthy patients "debilitated or dead."
26 The record in the above case in point "Blood clots from covid-19
27 can cause sever strokes in young and middle-age patients that
28 "obliterate large parts of the brain responsible for movement,
29 speech, and decision making..." Moreover, on Thanksgiving day
30 Mr. Kristich experienced a black-out where he was found
31 passed out on the floor of his cell. However, did counsel
32 investigate his mental health or look-into how many
33 black-out's had happened when Mr. Kristich was in the
34 process of a "plea bargain"? (The answer is No!)
35 Furthermore, Mr. Kristich was telling counsel to go to trial for
36 around 31 mo before covid-19. (extrem prejudice by counsel!)

37 B. Mr. Kristich received ineffective assistance of counsel due to
38 a conflict arising from a hostile and uncommunicative
39 relationship, and counsel(s) failure to point out any and
40 all evidentiary discrepancies to Mr. Kristich, and the court:
41 ("diligently discovered") scientific evidence that was
42 presented at Mr. Kristich(s) sentencing; which undermines
43 the prosecution(s) entire case and points to Mr. Kristich(s)
44 innocence (A.I.C.) (see United States v. Williams, 382
45 F. Supp. 3d 928 (9th Cir 2019)) "Even with the improvements
46 in amplification technology, other factors present challenges to
47 accurately identifying the number of contributors. The
48 challenge of allele sharing is "frequently" exacerbated
49 by samples that have degraded or which originally contained
50 only a small amount of D.N.A.") (see Exhibit A (2255))

51 Moreover, as seen in "Williams, 382" under B. Probabilistic
52 Genotyping and Bullet. "SERF did not seek to validate Bullet
53 for use with five-person mixtures." According to Hopper(s)
54 testimony, one key advancement of Bullet is its ability
55 to consider the possibility that some alleles are not
56 detectable because they have dropped out of the mixture. Due
57 to detectable or simply low quantities of D.N.A.; not all
58 of a contributor(s) alleles will necessarily be detectable
59 at every locus." (Post-plea)(Mr. Kristich found out a few
60 weeks) before his sentencing) (See Exhibit A-2(2255)) In
61 Mr. Kristich(s) case counsel did not inform him that the
62 prosecution(s) claimed evidence not only contained a very low
63 amount of D.N.A.; but was also a mixture of person(s).
64 However, the number of person(s) that make up the mixture

65 is still unknown to Mr. Kristich. (Quoting) John M. Butler,
66 of Fundamentals of Forensic D.N.A. Typing, 331 (2010)
67 [Gov's Ex 34 found in William's] "Trying to
68 generate a reliable S.T.R. profile with only a few
69 cell(s) from a biological sample is similar to looking
70 for an object in the mud or trying to decipher the
71 image in a fuzzy photograph!" (see Peter Gill, Supra
72 at 229.) "Interpretation of LCN results is not
73 straightforward." In light of the above Mr. Kristich
74 is asking was the D.N.A test in his case admissible
75 under Daubert, and the Fed. R. Evi. Rule 702.
76 Furthermore, it was very unreasonable that counsel did
77 not request a Daubert hearing or make objection(s) to
78 the above at sentencing: in this case. Mr. Kristich

79 is challenging the (L.C.N.) (D.N.A. testing); that the
80 low copy number testing is not generally reliable even
81 in the forensic science community, because the sample
82 in this case is too small, and yielded unreliable and
83 nonreproducible results. (The Lab who did the
84 testing; Mr. Kristich's counsel; and the government
85 know this is a fact.)
86 (Mr. Kristich(s) counsel failed to inform him that
87 the prosecution(s) witness was impeachable; and whether
88 any and all of the witness statement(s) could be used to
89 impeach the witness. As Mr. Kristich found out at sentencing
90 when the prosecution pointed it out. (As found in Mr. Kristich(s)
91 sentencing transcript(s).) Moreover, counsel(s) failure to
92 challenge and/or object to the use of such statement(s);

93 as fact(s) to support "relevant conduct" at sentencing
94 pursuant to Fed.R.Crim.P. Rule 32 and U.S.S.G. 1B1.3
95 (The applicable guideline say(s) "the court may rely upon
96 "reliable" hearsay so long as the evidence meet(s) the
97 preponderance of the evidence standard.") However, this
98 court used "unreliable" statement(s); four "fictional
99 stories" as "fact(s)" to support the above evidence
100 standard. (A 5th story was not even considered.) (These
101 were not fact(s) in the case!) As pointed out by Mr.Kristich
102 at sentencing Fed.R.Crim.P. Rule 32 and U.S.S.G 6A1.3
103 can be used when a witness(es) statement(s) should
104 not be considered. (see Mr.Kristich(s) sentencing
105 transcript(s).) ("counsel(s) failure to object to extream
106 prejudiced to the defendant" (by Judge Johnson /the court).)

107 D. Ineffective assistance of counsel due to professional
108 malconduct as show in Exhibit B (2255), recorded phone
109 call(s) with counsel talking about objection(s); to be made to
110 the P.S.I.; claim's that counsel told Mr. Kristich he
111 would be making at sentencing. However, (Alejandro
112 Fernandez) "counsel" prejudiced Mr. Kristich by not
113 making all objection(s); after almost a year of
114 recorded phone call(s) asking counsel to make such
115 "objection(s)".
116 E. Counsel failed to inform Mr. Kristich that he could
117 challenge the grand jury on the ground(s) that he/she was
118 not lawfully drawn summoned ... and may challenge
119 an individual juror on the ground(s) that the juror is
120 not legally qualified. Fed. R. Crim. P. Rule b (b) (1),

121 F. Counsel lied to Mr. Kristich about Fed.R.Crim.P.

122 Rule 6 (c) "The foreperson or deputy foreperson may

123 administer oath(s)... and will sign all indictment(s)..."

124 (When asked about the above rule counsel told

125 Mr. Kristich, "it is an electrotonic signature and

126 can not be seen; however when all the parties

127 signed the plea on electrotonic signature pad it

128 can be seen. In relation to federal procedural

129 Due process of law by way of the 5th Constitutional

130 amendment, "No person shall be held to answer for a

131 capital or otherwise infamous crime, unless on a

132 presentment or indictment of a grand jury without

133 Due process of law"; there was no true bill; (no signed

134 indictment in Mr. Kristich(s) case.) Fed.R.Crim.P.

135 Rule b(E) (3) (e) (ii) The court may authorize disclosure
136 at a time, in a manner, and subject to any other conditions
137 that it directs of a grand jury matter "at the request of
138 a defendant who shows a ground may exist to dismiss
139 the indictment because of any matter that occurred before
140 the grand jury. Counsel told Mr. Kristich that this rule does
141 not apply to the (defendant(s)) case. Moreover, Fed. R. Crim. P.
142 Rule 7(f) counsel did not file a motion for a bill of
143 particulars; the defendant may move for a bill of
144 particulars before or within 14 day(s) after arraignment or
145 at a later time if the court permits. Furthermore, the record
146 shows(s) that counsel for Mr. Kristich did not file any motions(s)
147 in his defense; for over three year(s) when Mr. Kristich was
148 telling counsel to go to trial on recorded call(s) (Not even one motion)

149 Fed. R. Crim. P. Rule 12 (b) (3) (A) (V): motions that must
150 be made before trial; The following defense(s), objection(s)
151 , and request(s) must be raised by pretrial motion; if
152 the basis for the motion is then reasonably available; (iii)
153 a violation of the Constitutional right to a speedy trial;
154 (180 day(s)) (see the speedy trial act.) (iv) Selective or
155 vindictive prosecution; (v.) an error in the grand jury
156 proceeding(s) or preliminary hearing. The only motion(s)
157 filed pretrial / preplea by counsel were to postpone
158 Mr. Kristich(s) trial nothing else is shown on the record of
159 the court. (When Mr. Kristich asked counsel about why
160 the court postponed so many time(s) counsel said it was
161 the judge doing this; however, the record shows(s) counsel
162 made the request. (More lie(s) on recorded phone call(s) at

163 C.C.A.)

164 G. Counsel failed to object to the use of State v. Romero,

165 2000 NMCA-029, 31, 128 N.M. 806, 999 p.2d, 1038.

166 "causing or encouraging a minor to refuse to obey the

167 reasonable and lawful command or direction of ... person who

168 has lawful authority over the minor" requires proof" that

169 the defendant or by exercise of reasonable care should have

170 known of such command or direction." (However, the defendant

171 Mr. Kristich could not have known.) (See plea agreement.)

172 Furthermore, the state of New Mexico, and the Federal courts)

173 "have not upheld a constitutional right to present a mistake-

174 of-age defense to a charge of Statutory rape when the

175 person is age 12" (or under) (See United States v. Juvenile Male,

176 211 F.3d 1169, 1171 (9th Cir 2000)" no constitutional right to

177 percent mistake-of-age defense to a charge of committing sex act
178 with a person under twelve." (see Perez v. State, 111 N.M. 260, 803 P.2d
179 249 (N.M. Sup.Ct. 1990) "though strict liability is required to protect
180 § 425 F, Supp 498) children under the age of thirteen, reasonable
181 mistake-of-fact defense permitted by judicial decision, if victim
182 is between 13 and 16 ... (in view of statutory provisions providing
183 for mistake-of-fact defense and requiring mens rea for all crimes
184 not deemed strict liability offenses by legislature, government
185 must prove defendant was aware of or was negligent to the age
186 of the victim and affirmative defense of mistake-of-fact must
187 be permitted; State v. Doba, 53 Wash. App 178, 765 P.2d 1737
188 (Wash. Ct. App. 1989.) "Moreover, when the minor represented self
189 to be over age to Mr. Kristich; mistake-of-fact or mistake of age
190 defense should have been permitted (had counsel not lied to

191 Mr. Kristich about the above defense on more than one recorded phone
192 call.) (see plea agreement and sentencing transcripts.) the minor in this
193 case told officers and a witness for Mr. Kristich she was over 18 years
194 old. (see Xinhua Ruan v. United States (June 27, 2022) Mr. Kristich did
195 not committ a "scienter" act; no "mens rea" as shown in the "learned"
196 language in the admission of facts. (see admission of facts;plea.)
197 Ho. As stated on the record by counsel (See sentencing transcripts)
198 Mr. Kristich was not aware of the imposed sentencing guidelines and
199 "2241" "preplea"; Mr. Kristich was made aware of the guidelines after
200 signing the plea agreement. This is a violation of the defendant(s) right
201 to enter into the plea agreement as an informed and voluntary plea.
202 This show(s) that Mr. Kristich was represented by ineffective assistance
203 of counsel; because Mr. Kristich was not aware of everything he needed to
204 know; and other possible defenses may not have been told to

205 Mr. Kristich, and all objection(s) should have been made by
206 Counsel.

207 I. Fed. R. Crim. P. Rule 52(b)- Plain Error, a plain error
208 that affects substantial right(s) may be considered even
209 though it was not brought to the court(s) attention. Under
210 Fed. R. Crim. P. Rule 26.2 (a)-(g), and Rule 32(i)(2)

211 Introducing Evidence; producing a statement. The court
212 may permit the parties to introduce evidence on the
213 objections. "If" a witness testifies at Sentencing, Rule
214 26.2 (a)-(d) and (f) applies. However, "If" a party
215 fails to comply with Rule 26.2; the court must
216 not consider that witness's testimony. Furthermore,
217 counsel made no objection(s) to the use of such; and
218 let Judge Johnson use the witness (minor(s)) statement(s)

219 as Mr. Kristich(s) statement to support the use of 2241
220 , and guideline(s); (see sentencing transcript(s)) Mr. Kristich
221 told Judge Johnson he never made a statement. Judge Johnson
222 say(s) the statement was in the '911 call'. However, the
223 911 call show(s) no such "fact". The statement used as
224 Mr. Kristich(s) statement was in fact one of minor(s)
225 many statement(s); that were not fact(s) in this case.
226 But was used as additional fact(s) to use "2241"
227 "offense involved conduct."
228 J. Preserving Claimed Error: Rule 51(b), a party may preserve
229 a claim of error by informing the court - when the court
230 ruling or order is made or sought - of the action the party
231 wishes the court to take, or the parties objection on the
232 court(s) action(s), and the ground(s) for that objection:

233 If a party does not have an opportunity to object to a
234 ruling or order, the absence of an objection does not later
235 prejudice that party. A ruling or order that admits or excludes
236 evidence is governed by Fed. R. of. Evid. 103. At sentencing
237 the U.S. attorney said that Mr. Kristich knew that A.W. was
238 under age because she told Mr. Kristich that she was going to
239 her mom(s) house in Michigan; (This is not a "fact" in the
240 case.) Moreover, the government claimed this was a "fact" of
241 "prior knowledge" that Mr. Kristich used to control the situation
242 , and was "offense involved conduct" described in 18 U.S.C. 2241
243 However, there is no evidence to show that this was ever
244 said to Mr. Kristich, and should not be used as a "fact."
245 This shows(s) counsel(s) failure to object to the government(s)
246 use of untruthful statement(s)/testimony after the

247

prosecution told the court that A.w.(s) Statement(s) were

248

untruthful, and the witness could be impeached.

249

K. As show in Exhibit C , Mr. kristich(s) counsel is ineffective

250

assistance of counsel for failure to appeal; when counsel knew

251

that the court, and the U.S. attorney breached the plea

252

agreement by going outside the admission of fact(s); counsel

253

handed Mr.kristich a note at sentencing that says(s) "Read

254

admission of fact(s) from plea". (120d (ten year(s)).

255

The admission of fact(s) clearly say(s) "who I have "learned"

256

was 13 year(s) old at the time". Furthermore, this undermines

257

the first element of 18 U.S.C.32422(a) - The defendant

258

"Knowingly" persuaded -- Is the court saying the words(s)

259

"Knowingly" and "learned" have the same meaning?

260

L. The court in Mr. kristich(s) case imposed no access to

261 adult porn with no objection(s) from counsel. Counsel

262 failed to object to no access to adult porn; and this

263 was improperly imposed by the court, and needs) to be

264 vacated because it was vague and/or improperly delegated

265 the court(s) authority to determin the defendant(s) sentence

266 to individual(s) who do not work for the court. (The

267 probation officer and the treatment provider.) The 1st

268 Amendment, under Artical III; the Judge can not let the

269 probation officer and/or the treatment provider determin

270 whether a condition should be imposed. (see United States v.

271 Eric D. Wagner ((2017) No. 15-3265); United States v.

272 Tom Lusul Malenya (No. 12-3069); Moreover there was

273 no porn in Mr. Kristich, case "child" or "adult". Under

274 18 U.S.C. 3583 (d)(2)- "involves no greater deprivation

275 of liberty than is reasonably necessary for the purposes set
276 forth in section 3553 ... However, this does involve a greater
277 deprivation of liberty than is reasonably necessary, and was
278 not part of any "criminal conduct"; and has nothing to do
279 with protection of the public from further crime(s) of Mr. Kristich
280 Ms. Congress basic statutory goal - "a system that
281 diminishes sentencing disparity ... depends) upon judicial
282 efforts) to determine, and base punishment upon, the real
283 conduct that underlines the crime of conviction". (See Supreme
284 court in United States v. Booker,) "that the consideration
285 of real conduct is necessary to effectuate Congress
286 purpose in enacting the guideline(s). (In the heartland
287 of case(s) most defendant(s) with more than one
288 conviction of 2422(a), and other charges received around

289 72 mo in the United States. (See United States v Burns (2009);
290 Marziani v. United States; United States v. Anderson, U.S. Dist. Lexis
291 4697 (2015).) Mr. Kristich(s) case was outside the heartland of
292 cases); however, he was still sentenced to 120 mo; more than
293 defendant(s) that have worse "criminal conduct", and more than
294 one charge. (Under 2422(a). Furthermore, the state charge
295 that is in support of his 2422(a); 30-9-11 (G)(1) having a
296 maximum term of imprisonment of 18 mo.
297 N. Counsel(s) failure to object to the use of the 2020
298 U.S.S.G.; "The ex-post facto clause prevents a court from
299 sentencing an offender under a new law that is more onerous
300 than the law in effect when the offense was committed." (see
301 Miller v. Florida, 482 U.S. 423, 96 L.Ed. 2d. 351, 107 S.Ct
302 2446 (1987).) "The purpose of the ex-post-facto clause is

303 to give the citizenry fair notice of the consequences of their
304 actions, and to permit individual(s) to rely on the meaning of
305 the law explicitly charged (Id at 430), the ex-post-facto
306 clause applies to the federal sentencing guidelines). Counsel
307 should have objected; and requested the use of the 2017
308 U.S.S.G., and they should have been considered. Mr. Kristich is
309 challenging the use of the 2020 U.S.S.G.; any policy statement(s)
310 official commentary of the sentencing commission: the 2017
311 set that was in effect when the offense was committed
312 should ~~be~~ used. (see United States v. Morrow, 925 F.2d. 779
313 (4th Cir 1991) "Therefore, if comment 2, as amended, provides a
314 more severe punishment for the accused than was applicable at
315 the time his offense was committed, then it would be
316 impermissible to consider it in his sentencing."

317 ① In light of all the above Mr. Kristich(s) counsel advised
318 him to sign a plea in deprivation, and violation of Mr. Kristich(s)
319 Constitutional Rights; Under the 5th Amend.; the 6th Amend.,
320 the 14th Amend.; the 1st Amend.; the 10th Amend.; the 11th Amend.; et, al
321 ect. Moreover, if it was not for his counsel(s) extream error(s), and
322 lie(s) the outcome of Mr. Kristich(s) case would have been
323 different, because Mr. Kristich would not have taken a guilty plea,
324 and/or would not have received such a severe sentence; if it
325 were not for his counsel(s) extream prejudice, Mr. Kristich
326 would have gone to trial.

327 Actual Innocence Claim(s)

328 ① In light of House v. Bell, 547: all claim(s) herein,
329 Mr. Kristich is claiming "Actual Innocence", because counsel
330 did not tell him or raise any and all possible defense(s);

331 evidence; law(s); Rule(s); Const. Amend.; U.S.S.G.(s); Statute(s);

332 et.al; ect.

In Conclusion:

333 Wherefore, Mr. Kristich(s) federal procedural due process

334 and equal protection of law privileges, and immunities; are

335 guaranteed by the Constitutional Doctrine. The ineffective

336 assistance of counsel has so prejudiced the defendant up to

337 this time table of the Fed. R. Crim. P.; possible defense(s);

338 evidence; law(s); Rule(s); Constitutional Amendment(s); U.S.S.G.;

339 Statute(s); et.al; ect; that Mr. Kristich is concerned that the

340 federal due process of law herein will be inconsistent (as has

341 been) beyond a reasonable doubt that the due process of law

342 violations(s) herein will continue to morph if this court does

343 not grant relief at this time. Since counsel has been

344 ineffective assistance of counsel as "due diligence" by Mr. Kristich

345 has discovered, how can Mr. Kristich expect a fair and just
346 due process based on these infraction(s) and due process violations)
347 ? Ineffective Assistance of counsel ~~has~~ been established and can be
348 seen on the record of the court. Last, "if" the court does not
349 dismiss this case on federal due process of law violation(s), then
350 how can Mr. Kristich have a fair, and just due process at any
351 stage of the proceeding(s) within this venue? Therefore, the only
352 logical answer of sound reason is the court lack(s) subject
353 matter jurisdiction.

354 Prayer For Relief:

355 In light of the United States Constitution; and
356 the case law(s); law(s); The Strickland Test.
357 Mr. Kristich is entitled to relief in one of ~~the~~ way(s);

358 ① That this court grant Mr. Kristich a new trial on the
359 charge in this case, because his plea, and sentence are
360 in violation of the United States Constitution; making
361 the plea, and sentence illegal. Furthermore, the plea is
362 null and void.

363 ② That this court dismiss this case because of the
364 herein infraction(s) and due process violation(s); Therefore,
365 the court lack(s) subject-matter-jurisdiction.

366 ③ That this court resentence Mr. Kristich based on
367 the true "fact(s)" of his case; because he is
368 entitled to at least the minimum amount of relief
369 required by law. Furthermore, that the court grant
370 Mr. Kristich any and all relief that it deems apt
371 and that will be in the interest of justice.

372 Respectfully submitted Orin Kristich
Name

373 I certify under penalty of perjury Orin Kristich
Signature

374 that the foregoing is true and correct. 07 /25/ 2022

375 Form 7. Declaration of Inmate Filing :

376 I am an inmate confined in an institution. Today 1/1/2022,

377 I am depositing the Petition 2255 in the institutions

378 internal mail system, First-class postage is prepaid. I

379 hereby certify that this petition was sent by U.S. mail

380 on the above date.

381 I declare under penalty of perjury that the foregoing

382 is true and correct under 28 U.S.C. § 1746; 18 U.S.C. § 1621

383 Orin Kristich

Name

384 Orin Kristich
Date 07/25/ 2022
Signature